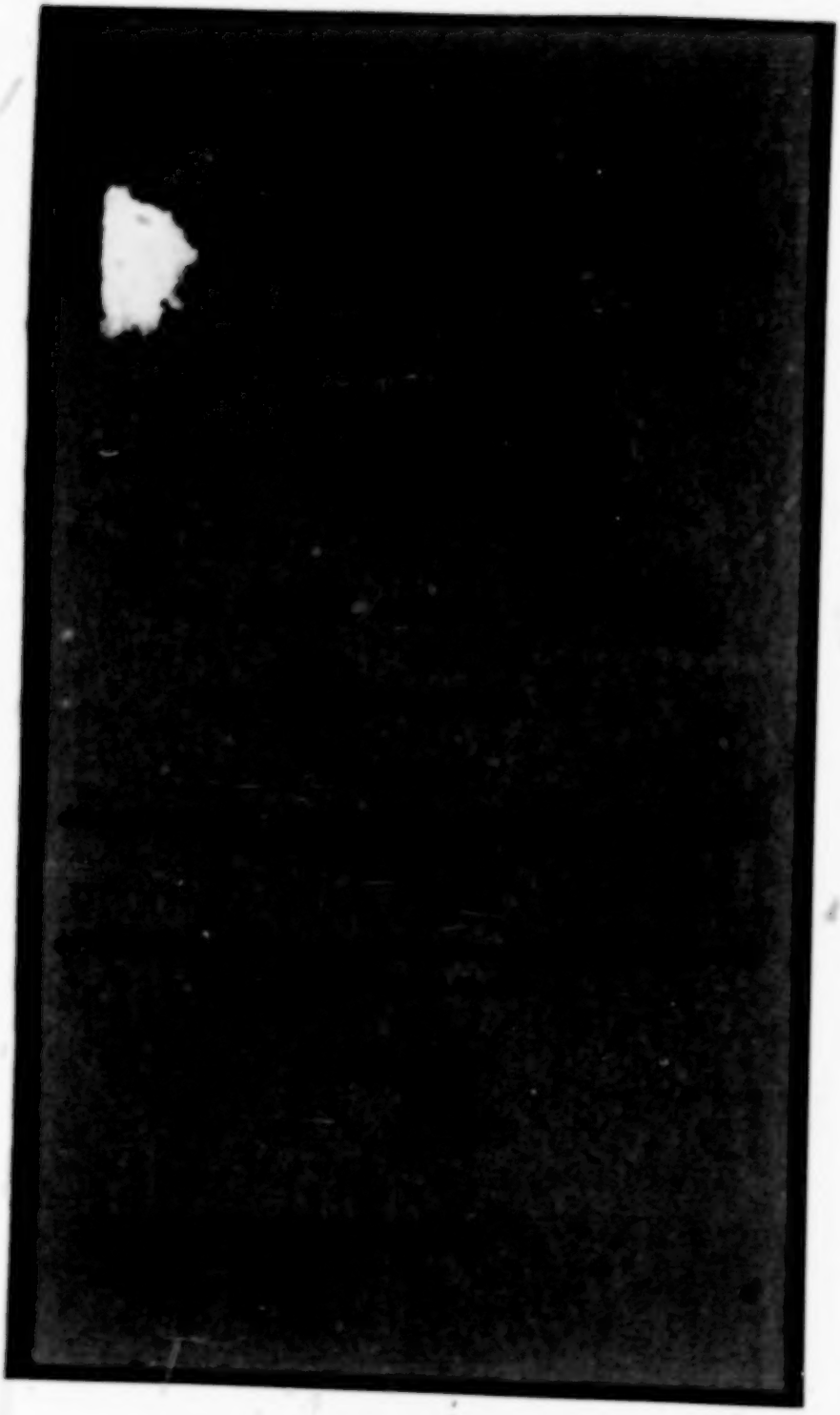


(27,332)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 577.

IOWA ELECTRIC COMPANY, APPELLANT,

vs.

CITY OF FAIRFIELD, IOWA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1920.

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a Pleas and proceedings before Honorable Martin J. Wade, Judge of the District Court of the United States for the Southern District of Iowa, in a certain cause lately pending in the Ottumwa Division of said Court, at Ottumwa, Iowa, being numbered 4012-Equity, wherein Iowa Electric Company is Complainant and The City of Fairfield, Iowa, et al., are defendants.

Appearances:

Wm. Chamberlain, Cedar Rapids, Ia.;
John A. Reed, Cedar Rapids, Ia.;
Wm. Smyth, Cedar Rapids, Ia.;
Attorneys for Complainant.
X. C. Nady, Fairfield;
Ralph H. Munro, Fairfield;
Attorneys for Defendants.
Wm. C. McArthur, Clerk, P. O. Des Moines, Ia.

1 In the District Court of the United States for the Southern District of Iowa, in the Ottumwa Division.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MONROE, Mayor; J. W. PRICE, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, Defendants.

Citation on Appeal.

Filed Oct. 4, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

UNITED STATES OF AMERICA, *ss:*

To City of Fairfield, Iowa; R. H. Monroe, Mayor; J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 15th day of November, A. D. 1919, pursuant to an order allowing an appeal filed and entered in the clerk's office of the district court of the United States for the Southern district of Iowa, from a final decree signed, filed, and entered on the 15th day of August, 1919, in that certain suit, being in equity No. 4012, wherein Iowa Electric Company is plaintiff and you are defendant and appellee, to show cause, if any

there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

2 Witness the Honorable Martin J. Wade, United States District Judge for the Southern District of Iowa, this 25th day of Sept., 1919, and of the Independence of the United States 144".

MARTIN J. WADE,
U. S. District Judge for the District of Iowa.

3 STATE OF IOWA,
Jefferson County, ss:

M. S. Randall being duly sworn on oath says: I am Deputy Sheriff in and for said County; I hereby certify and return that I received the foregoing Citation on Appeal for service on the 29th day of September, 1919, and on the same day I served the same upon the City of Fairfield, Iowa by reading said notice to R. H. Munro, Mayor of said City and delivering to him personally a copy thereof and upon R. H. Munro, Mayor, J. W. Price, Lon Israel and W. H. Connor, Councilmen, and X. C. Nady, City Attorney, by reading the same to each of them and delivering to each of them personally a copy thereof and upon the same day served the same upon J. F. Dearduff, Councilman, by leaving a copy thereof with — Dearduff, his wife, a member of his family and a person over fourteen years of age; I further certify and return that I served the same upon W. R. Baker, Councilman, on September 30th, 1919 by leaving a copy thereof with his wife — Baker, a member of his family and a person over fourteen years of age—neither said Dearduff nor Baker being found in my County. I further certify that F. H. Simpson, one of the defendants named in the said Citation, died in said City since the commencement of said action.

All done in the City of Fairfield, Jefferson County, Iowa on the dates above mentioned.

M. S. RANDALL,
Deputy Sheriff.

Subscribed and sworn to before me by M. S. Randall this 30th day of September, 1919.

Witness my hand and seal notarial.

[Notarial Seal J. S. McKemey, Fairfield, Iowa.]

J. S. McKEMEY,
Notary Public.

Fee Bill:

Service	$2.25
Copies	1.60
Mileage	.80
	$4.65

4 Be it remembered that on the 15th day of May A. D. 1918 there was filed in cause No. 4012-Equity Ottuma Division a Bill of Complaint in the case of Iowa Electric Company vs. The City of Fairfield, Iowa, et al., which said Bill of Complaint is in words and figures as follows to-wit:

In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNRO, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Monroe, W. H. Conner, W. R. Baker, Defendants.

Bill of Complaint.

Filed May 15, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

To the Honorable Judge of the District Court of the United States, Southern District of Iowa, Ottumwa Division:

Iowa Electric Company brings this, its Bill of Complaint against the city of Fairfield, Iowa, R. H. Munro, Mayor, J. W. Price, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Munro, W. H. Conner, W. R. Baker, and further says, that said city
5 of Fairfield, is a city of approximately 6,100 inhabitants, many of whom, the exact number not being known to your orator, are tax-payers, that there are also residing in said city approximately 1,000 persons, who are consumers of gas furnished by your orator. That it is impossible for your orator to join each of said inhabitants, tax-payers and consumers as parties defendant in this action and therefore R. H. Munro, W. H. Conner, W. R. Baker are made parties defendant to this action as representatives of each of the three classes of persons hereinbefore mentioned and your orator further says, that the given names of the above named defendants are unknown to your orator and thereupon your orator complains and alleges:

I.

That your orator is a corporation created, organized and existing under and by virtue of the laws of the State of Iowa, and is a citizen of the State of Iowa having its principal office and place of business in the city of Cedar Rapids, Iowa.

II.

The city of Fairfield is a municipal corporation being a city of the second class duly organized under the provisions of the Statutes of Iowa and said city has a population of upwards of 6,113 inhabitants and its legislative and executive powers are vested in and exercised by the Mayor and City Council, consisting of a Mayor and six councilmen above named, each and all of whom were the Mayor and councilmen of said city of Fairfield from and after the month of April, 1917 up to the time of the filing of this Bill of Complaint, and said defendant X. C. Nady is the City Attorney of said city of Fairfield and as such, is charged with the duty of enforcing the provisions of ordinances of said city of Fairfield.

6

III.

The amount involved in this controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and this controversy involves the construction of certain provisions of the Constitution of the United States, to-wit:

1. Those prohibiting the taking of complainant's property for public use without just compensation therefor, to-wit the Fifth and Fourteenth Amendments thereto.

2. Those prohibiting the taking of its property without due process of law, to-wit the Fifth and Fourteenth Amendments thereto.

3. Those guaranteeing complainant equal protection of the law, to-wit the Fourteenth Amendment thereto.

IV.

That on or about the 15th day of December 1916, the defendant city of Fairfield, being then as now a city of the second class and having a Mayor and City Council, duly granted to William G. Dows, Isaac B. Smith, John A. Reed and to their successors and assigns, a franchise for a term of twenty years from and after its acceptance, to acquire, erect, maintain and operate a gas plant in the city of Fairfield and to use the streets, avenues, alleys, public places of the city for the purpose of laying down and maintaining a system of pipes for the purpose of distributing said gas to the said city and its inhabitants for light, heat and fuel purposes.

V.

That said franchise was duly submitted to and approved by the legal voters of the city of Fairfield at a special election duly called and held for that purpose on the 30th day of January A. D. 1917 and said franchise was duly accepted in writing by the said William

7 G. Dows, Isaac B. Smith and John A. Reed in the manner and form required by the Ordinance granting said franchise and by reason of the passage, approval and acceptance of said franchise as aforesaid said franchise became a legal and binding franchise of the said city of Fairfield, and your orator says, that said franchise has never been repealed and is now in full force and effect and your orator says that it purchased from said William G. Dows, Isaac B. Smith and John A. Reed, the said franchise and all of the rights, powers and privileges thereby granted to and conferred upon them and received an assignment thereof in writing and that your orator is still the owner of said franchise and said rights and that after said date last above named your orator acquired a gas plant and distribution system located in the city of Fairfield and which gas and distribution system furnished gas for light, heat and fuel purposes to the said city of Fairfield and its inhabitants, and ever since the purchase of said plant and franchise, has continued to operate said gas works up to this time and to furnish the said city of Fairfield and its inhabitants with gas for light, heat and fuel purposes, and your orator says, that it is now rightfully, maintaining and operating said gas plant and distribution system in said city of Fairfield, Iowa.

VI.

Your orator further says that Ordinance No. 192 of said city of Fairfield fixes maximum rates which may be charged for gas service rendered to the said town and its inhabitants as follows:

"For the first 3,000 cubic feet, $1.375 per thousand cubic feet.
For the next 3,000 cubic feet, $1.325 per thousand cubic feet.
For the next 6,000 cubic feet, $1.275 per thousand cubic feet.
For the next 6,000 cubic feet, $1.20 per thousand cubic feet.
For the next 6,000 cubic feet, $1.10 per thousand cubic feet.
For the next 6,000 cubic feet, $1.05 per thousand cubic feet.

"For all consumption over 30,000 cubic feet, $1.00 per thousand cubic feet; provided however, the gas company will be allowed to charge a penalty of five cents (5¢) per thousand cubic feet
8 if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

"The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

"The rates which grantee is entitled to charge for services from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa."

And your orator further says, that it has charged for service furnished by it at and in the city of Fairfield in accordance with the aforesaid rates from the first day of March, 1917, up to and including the 30th day of April, 1918.

Your orator further says that during the aforesaid period said rates have failed to produce a reasonable and fair return of net profit upon the actual value of your orator's necessary plant and equipment used and useful in furnishing gas service to the said city of Fairfield and its inhabitants and the actual revenue received by your orator from such service during the said period by it, was insufficient to pay the actual operating expenses and taxes of your orator, set aside an amount equal to the actual annual depreciation and impairment of your orator's property as aforesaid and to leave to your orator any sum whatever as an earning upon the actual value of your orator's necessary plant and equipment used and useful in furnishing said service as aforesaid.

Your orator further says that during the eighteen months last past, the cost of gas coal, steam coal, metals, oils and other essential materials used and consumed in the manufacture and distribution of gas have increased from twenty-five to one hundred per cent; that the amount of labor and cost of labor per hour have also largely increased, all of which has resulted in an increase in the cost in the manufacture of gas to your orator, and that said increase, at the time of filing this Bill of Complaint is not less than forty cents (40¢) per one thousand cubic feet greater than the cost to your orator during the period ending eighteen months prior to the filing of this Complaint; that this increased cost is due to the unprecedented demand for all such materials arising from the state of war which now exists, and the fixing of prices for coal by the President of the United States, through the Fuel Administration, by authority of the Act of Congress, commonly known as the "Food Survey Law and Food Control Law," approved by the President on August 10th, 1917, and the fixing of prices of other commodities for Government use by the several departments of the Government, and your orator further says that there is no reasonable prospect of any decline in said prices during the continuation of said war or for a prolonged time thereafter.

9

Your orator further says, that after acquiring said plant that it expended large sums of money in placing said plant in good operating condition and after placing said plant in good operating condition it operated same carefully and economically but said plant, at the rates hereinbefore set out would not and will not produce sufficient revenue to pay operating expenses, taxes, depreciation and leave any sum whatever as a return to your orator upon the fair and reasonable value of your orator's property used in furnishing said service as hereinbefore set out and your orator upon ascertaining said facts, during the months of January, February, March, and April, presented to said city council of said city and its individual members statements of the earnings and operation of said plants showing said facts and petitioned said council to take such action as would authorize your orator to charge higher rates than those hereinbefore set out, for said gas service and rates, which would furnish to your

orator a gross revenue sufficient to pay operating expenses, taxes, depreciation and a fair return of net profit upon the value of your orator's property used in furnishing said service as aforesaid, but said city council did not grant said application.

VII.

That on or before the first day of May, 1918, your orator forwarded to each of the consumers of gas at and in said city the following letter:

"Fairfield, Iowa,
April —, 1918.

"To Our Customers:—

"The war has increased the cost of living and doing business to everybody. Everything you buy costs more and the Iowa Electric Company has suffered the same as you have, especially in its gas business and it must continue to pay these increased costs for it cannot economize 'by doing without things.' It uses no luxuries which can be dispensed with. All of its purchases are necessaries, for gas is only coal, oil and labor manufactured into an article for your use.

"We are now paying increases of $— per ton or $— per year for gas coal and $— per ton or $— per year for furnace coal and $— per month and $— per year for gas house labor over what was paid to operate our gas plant when we asked for our franchise.

"The increase in cost of living and doing business in most cases has been met by everybody increasing the cost of what he sells, be it merchandise or labor, that is, everybody except the Iowa Electric Company. It has borne its losses silently for more than a year hoping that prices would become normal. It appears that no relief is in sight. The war may last for years. The increases in the price of coal have been approved by the Government. Labor will go even higher owing to the army draft and it is necessary that we turn to our customers and ask that they help by paying a temporary increase in rates of 22½¢ per 1,000 or $1.60 per 1,000 net until the end of the war or until costs become normal and no longer. This increase will net us about $2,700.00 per year while our increased cost is $— per year, and in addition we pay.

"Other cities in Iowa have come to the relief of their gas companies by increasing rates; Grinnell has raised its rates to $1.90; Marengo to $1.85; Waverly $1.65; Ames $1.65; Iowa Falls $1.75; Oelwein $2.15.

"If you use other fuel in place of our gas you would be subject to high costs, much greater than the increases which we are asking you to pay. It is impossible for us to give you the good service you want and the good service we desire to give you unless we charge a rate which will give us sufficient funds to pay the cost of service and the maintenance of our property. President Wilson has said the maintenance of the gas and electric service is necessary to the successful conduct of the war and in February in a letter to Secretary

McAdoo says: 'It is essential that these utilities shall be maintained at their maximum efficiencies, that everything reasonably possible should be done with that in view. I hope that state and local authorities where they have not already done so, when the facts are laid before them will respond promptly to the necessities of the situation.'

'I should be glad to have you communicate with the
11 local authorities whenever the information in your possession suggests that such a course is desirable and in the national interest.'

"The company will bill for all gas service furnished after May 1st, at $1.60 per thousand cubic feet and respectfully hopes for your co-operation.

"IOWA ELECTRIC COMPANY,
By C. S. WOODWARD,
"Secretary."

And thereupon the city council of the defendant city at the regular monthly meeting held May 6th, 1918, passed a resolution directing the city attorney to,

"start proceedings against the Iowa Electric Company, restraining them from raising the gas rates from $1.375 per thousand, to $1.60 per thousand cubic feet."

Your orator further says, that on or about the 1st day of July, 1914, it made an issue of its First Mortgage Gold Bonds, the payment of which is secured by a Deed of Trust of the Company and Supplemental Deeds of Trust, conveying all of the property of your orator including the gas plant, distribution system and franchise under which your orator is now operating said plant and your orator further says that a substantial portion of the proceeds of the sale of said bonds was used in acquiring said gas plant and distribution system aforesaid and in the improvement of said gas plant, and said rates provided for gas service as herein set out will not provide any funds after the payment of operating expenses of said plant to pay any portion of the interest as same accrues on said bonds outstanding; that under the terms of said Trust Deed securing said bonded indebtedness, failure to pay installments of interest when the same are due, constitutes a cause for declaring the entire principal of said mortgaged indebtedness due, and for the immediate seizure of the mortgaged property, either by the Trustee named in said Trust Deed, or by a Receiver to be appointed by the court, pending the foreclosure of said Trust Deed, and unless your orator pays said interest when the same is due, the entire prin-
cipal of said bonded indebtedness will be declared to be due
12 and payable forthwith, and your orator's said property will be seized, either by the Trustee named in said Trust Deed, or by a receiver to be appointed by some court, and said mortgage will be foreclosed and the plant and property sold, thus resulting in large financial loss to your orator. Your orator further says that the going rate of interest upon money borrowed for the construction and

operation of public utilities is now in excess of eight per centum (8%) per annum and your orator knows of no place where a loan could be secured in an amount sufficient for the payment of said bonded indebtedness.

IX.

Your orator further avers that the legal rate of interest in the State of Iowa is six (6%) per centum per annum, that the rate of interest now being charged at and in the city of Fairfield for loans is not less than seven (7%) per centum per annum; that money cannot be obtained in Fairfield and vicinity for the benefit of its public utilities, but the same must be sought and obtained in the money centers of the United States, and owing to the unusual conditions incident to the state of war now existing, the cost of obtaining such funds, including interest is between nine (9%) per centum and ten (10%) per centum per annum; that the usual going rate of return demanded by investors in such properties upon the stocks of companies, subject to the business risks and hazards as are incident to the public utility business prior to 1916 was not less than seven (7%) per centum, and that at the present time it is impossible to market such stocks in sufficient quantities to provide for the financial requirements of the utility companies.

X.

13 Your orator further avers that the amount in controversy in this action cannot be determined from the gross or net revenue, it will receive for the furnishing of said gas service rendered by it to said city and its inhabitants but said amount in controversy greatly exceeds the amount of $3,000.00 for the reason that the said rates herein complained of materially interfere with the right of your orator to charge a reasonable rate for said service furnished to the said city and its inhabitants.

Your orator further says, that said right is of real and substantial value to your orator irrespective of the amount of charges fixed by said ordinance and that the right to charge fair and reasonable rates during that portion of your orator's franchise which is unexpired (eighteen years) is the real subject of dispute in this action and the object of this Bill is to preserve to your orator said right and the value thereof.

Your orator further says, that this value is not liquidated or fixed by law, but that said value is not less than Fifty Thousand Dollars ($50,000.00).

XI.

Your orator further says the gross revenue, operating expenses, taxes and net earnings, arising from the operation of its said plant in the city of Fairfield, under the rates herein complained of, from the

time your orator commenced to operate said plant, to-wit March 1st, 1917 to March 31st, 1918 as follows:

Gross Revenue	$18,270.13
Operation (exclusive of taxes & administration)	14,703.35
Taxes (estimated)	510.19
Administration	528.00
Total expense	15,741.54

Leaving a net earning of $2,528.59, without making any provision whatever, for the annual depreciation upon your orator's property used in rendering said service as aforesaid or return upon the
14 actual value of your orator's said property used in rendering said service.

XII.

Your orator further says, that the actual value of its property used and useful in carrying on its said gas business at and in the said city of Fairfield is not less than One Hundred Fifteen Thousand Dollars ($115,000.00) and that a reasonable annual charge for depreciation and other impairment including inadequacy and obsolescence of its said plant and equipment used in carrying on its said gas business in the city of Fairfield is not less than three (3%) per cent upon the said physical properties subject to depreciation as aforesaid, and that a fair and reasonable value of said physical properties subject to depreciation is not less than the sum of One Hundred Thousand Dollars, ($100,000.00). That a reasonable annual return upon the actual value of your orator's property used and useful in furnishing gas service in said city is in the sum of eight (8%) per cent of the actual value of said property of your orator used and useful in carrying on said gas business aforesaid, and your orator further says, that said net earnings for the year ending March 31st, 1918, were considerable less than the amount of said annual depreciation charge.

XIII.

Your orator further says, that its maximum average sales in the city of Fairfield does not exceed thirteen million cubic feet per annum and upon such sales, an additional compensation of not less than 75 cents per thousand cubic feet of gas sold will be required to furnish sufficient funds to pay operating expenses, annual depreciation and other impairment of the property of your orator and a return of eight (8%) per centum per annum upon the actual value of the property of your orator used and useful in carry-
15 ing on its said gas business in said city of Fairfield with the right to charge a minimum monthly bill of seventy-five (75¢) and an additional charge of ten cents (10¢) per thousand feet, if said bills are not paid within ten (10) days after being rendered.

XIV.

Your orator further says, that the provisions of said Ordinance No. 192 fixing said rates herein complained of should be held by this Honorable Court to be null and void and of no force and effect whatever, as against your orator for the following reasons:

1st. Because the said Ordinance if enforced would result in the taking of complainant's property for public use without just compensation therefore, for the reason that under the rate therein fixed the complainant would be obliged to produce and furnish gas to its consumers in said city at less than the actual cost to complainant of such gas and service and the value of complainant's plant as such would thereby be destroyed and the use and income thereof taken for public use without just compensation to complainant, contrary to the provisions of the 5th Amendment of the Constitution of the United States and the provisions of Section 18 of Article I of the Constitution of the State of Iowa.

2nd. That the enforcement of said Ordinance would result in the taking of complainant's private property without due process of law for all of the reasons set forth in this Bill of Complaint and particularly for the reason set forth under the preceding sub-division of this paragraph, contrary to the terms of the 5th Amendment to the Constitution of the United States and Section 9 of Article I of the Constitution of the State of Iowa.

3rd. That the enforcement of said Ordinance would result in denying to complainant equal protection of the laws for all of the reasons set forth in this Bill of Complaint and particularly those reasons set forth in the first and second sub-divisions of this paragraph contrary to the terms of Section 1 of the 14th Amendment of the Constitution of the United States.

4th. That said provisions so fixing the rates is void because it is an attempted abridgment of the continuing power of rate regulation over public utilities furnishing gas service, conferred upon cities and towns by Section 725 of the Supplement to the Code of Iowa (1913), which said abridgment is prohibited by the express terms of said Section 725, which is as follows, to wit:

"Sec. 725. Regulation of Rates and Service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations to furnish any person applying therefore, along the line of its pipes, mains, wires, and other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and to regulate and fix the rent or rates for water, gas, heat and electric light or power, to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract."

5th. Because said provisions of said Ordinance undertake to fix the rates for a specified period of three years and it therefore deprives succeeding councils of the right to exercise the rate regulating powers conferred by Section 725, and to prohibit a re-adjustment of rates as the same may be necessary in order to fix a fair and reasonable rate for service according to conditions and circumstances as they may exist from time to time during the said three year period.

XV.

Your orator further shows the court that it has over one thousand consumers of gas in the city of Fairfield and that the monthly bills of a greater portion of said consumers are for small amounts, ranging from twenty-five cents to Two Dollars, (25¢ to $2.00) per month, and should your orator comply with the terms of said ordinance herein complained of and said ordinance should by this court be declared to be null and void, it would in practically all cases be impossible for your orator to collect the small sums due it from the consumers, for the reason that many of the consumers are transients, many others are judgment-proof and in all cases the costs of collection would be so great as to render collection unprofitable and your orator would be virtually compelled to lose the difference between the compensation fixed in such ordinance and a reasonable compensation.

17

XVI.

Your orator further alleges that unless restrained by an injunctive writ of this Honorable Court the defendants will attempt to enforce the provisions of said ordinance by a multiplicity of civil suits and by arrests, fines and penalties, unjustly, unlawfully and oppressively prevent your orator from charging a reasonable rate for gas service furnished its customers and against such unjust, unreasonable and oppressive action upon the part of the defendants and the class of persons of whom said defendants are representative, your orator has no adequate remedy at law and forasmuch as your orator can have no adequate relief except in this Court and to the end that the defendants and those classes of persons of whom the defendants are representative, may if they can show why your orator should not have the relief herein prayed for and to the end that the defendants and those classes of persons of whom the defendants are representative may answer your orator's bill according to the course of practice in this Court but not under oath, answer under oath being hereby expressly waived, your orator prays that it be declared by decree of this Court that the provisions of said Ordinance No. 192 of the defendant city of Fairfield relating to the rates of charge for gas service are in violation of the Constitution of the United States and of the Constitution of the State of Iowa for the reason hereinbefore stated and for such other and further reasons as may be found by your Honor to exist and that such ordinance be declared void and of no effect and that the operation of said ordinance be forbidden, restrained and suspended until final determina-

tion of this action and final decree herein and that the defendants and those classes of persons of whom the defendants are representative, and each of them be enjoined and restrained as follows:

18 That the city of Fairfield, Iowa, and each of the other defendants and those classes of persons of whom the defendants are representative and their successors in office be temporarily and permanently restrained and enjoined from any attempt to compel our orator, its agents, employees or representatives, to obey or comply with the terms of said Ordinance No. 192 relating to rates of charge for gas service and that the said city of Fairfield and the remaining defendants are representative, and their successors, in office be temporarily restrained and enjoined from taking or caused to be taken any step, action or proceeding against your orator or any of your orator's employees, agents, servants or representatives for failing or refusing to comply with the provisions of said Ordinance No. 192 relating to rates of charge or from charging or receiving for gas service more than prescribed therein and that said temporary writ of injunction be issued pending the trial of this suit according to the course and practice and out of and under the seal of this Honorable Court according to the statutes in such cases made and provided, and that upon final hearing of said action, said injunction be made permanent.

And your orator prays that it may have and recover judgment for its costs herein expended and that it have such other and further relief as the circumstances of the case require and is conformable to equity and good conscience; and that a Writ of Subpena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants and each of them commanding them and each of them upon a day therein named to appear and answer unto this Bill of Complaint, (but not under oath, answer under oath being hereby expressly waived,) and to abide and conform to such orders and decree in the premises as to the court shall seem meet and as is required by the principals of equity and good conscience.

WM. CHAMBERLAIN,
JOHN A. REED,
WM. SMYTH,
Solicitors for Complainant.

19 STATE OF IOWA,
State of Linn County:

John A. Reed, being duly sworn, says that he is the Vice-President of the Complainant, Iowa Electric Company, and as such officer of said company takes an active part in the management of the business affairs of said company and of the financial transactions thereof; that he has given the business of the Complainant at Fairfield, Iowa, a large amount of personal attention ever since March 13th, 1917, and is familiar with the transactions and operations of Complainant and of the property of Complainant at Fairfield, Iowa; that he has read the foregoing Bill of Complaint and that he is familiar with the facts therein stated and that the facts therein stated are true as affiant verily believes.

JOHN A. REED.

Subscribed and sworn to by the said John A. Reed, before me on this 14th day of May, A. D. 1918.

JOHN B. ANDERSON,
Notary Public in and for Linn County, Iowa.

20 And thereafter to-wit: On the 24th day of May, A. D. 1918, Subpœna in Chancery with Marshal's return of service was filed in said cause which is in words and figures as follows, to-wit:

21 *Subpœna in Chancery.*

(Endorsed:) Filed May 24, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

UNITED STATES OF AMERICA,
Ottumwa Division,
Southern District of Iowa, ss:

The President of the United States to City of Fairfield, Iowa, R. H. Munro, Mayor; J. W. Price, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilman; and X. C. Nady, as City Attorney; R. H. Munro, W. H. Conner, W. R. Baker.

We command you, and each of you, that you appear before the Judge of the District Court of the United States for the Southern District of Iowa, at Ottumwa, the fourth day of June, A. D. 1918, to answer to the bill of complaint of Iowa Electric Company this day filed in the office of the clerk of said Court, and then and there to receive and abide by such judgment and decree as shall then and thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the said Southern District of Iowa:

Returnable twenty days from the date hereof, to-wit, on the fourth day of June, A. D. 1918.

Witness, the Honorable Martin J. Wade, Sole Judge of the District Court of the United States, Southern District of Iowa, at the city of Ottumwa, Iowa, this the 15th day of May, A. D. 1918, and of the Independence of the United States the 143rd.

(Sgd.)
[SEAL.] WM. C. McARTHUR,
Clerk U. S. District Court,
Southern District of Iowa.
[SEAL.] By GERTRUDE DARRELL,
Deputy.

Memorandum.

The within named defendants are notified that unless they file an answer or other defense in the Clerk's Office of said Court on or before the twentieth day after service hereof, the complaint will be

taken against them as confessed, and a decree entered thereon accordingly.

[SEAL.] WM. C. McARTHUR,
Clerk U. S. District Court,
Southern District of Iowa,
By GERTRUDE DARRELL,
[SEAL.] *Deputy.*

(Endorsed:) No. 4012 Eq. Supœna in Chancery. District Court of the United States, Southern District of Iowa, Division Ottumwa. Iowa Electric Company, Complainant, vs. City of Fairfield, Iowa, R. H. Munro, Mayor, J. W. Price, J. F. Deardurff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Munro, W. H. Connor, W. R. Baker, Defendants. Returnable 6-4 A. D. 1919. Wm. C. McArthur, Clerk. Wm. Chamberlain, John A. Reed, Wm. Smith, Comp'ts Sol.

Marshal's Return.

This writ came into my hands for service at Ottumwa, Iowa, on May 16, 1918, and service made as follows:

On City of Fairfield, Iowa, by delivering copy to R. H. Munro, Mayor of said city; and to R. H. Munro, as Mayor of the City of Fairfield, Iowa; to J. W. Price, J. F. Deardurff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and to X. C. Nady, as city attorney, of the City of Fairfield, Iowa, and to R. H. Munro, W. H. Connor, and W. R. Baker, personally, at Fairfield, Iowa, May 16, 1918.

Marshal's Fees.

Mileage 30 miles @ .06	$1.80
Service on 12 @ 2.00	24.00
	$25.80

NICHOLAS F. REED,
U. S. Marshal.
J. E. BEEMAN,
Deputy.

22 And thereafter to-wit: On the 22nd day of May, A. D. 1918, there was filed in said cause Objections and Resistance to Application for Temporary Injunction which is in words and figures as follows to-wit:

23 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNRO, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Munro, W. H. Conner, W. R. Baker, Defendants.

Filed May 22, 1918. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

Objections and Resistance to Application for Temporary Injunction.

Comes now the above named defendants, and each of them, by their attorneys X. C. Nady and Ralph H. Munro, and object to and resist the application for Temporary Injunction in this cause because of the following:

1. That on or about the 15th day of December, 1916, William G. Dows, Isaac B. Smith and John A. Reed, presented to the City Council of the City of Fairfield, Iowa, the following proposed ordinance:

24 *Ordinance No.* 192.

An Ordinance Granting Rights and Franchises to William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, for furnishing gas for light, heat and fuel, to the City of Fairfield, Iowa, and the inhabitants thereof, and for acquiring, erecting and maintaining a gas plant in said City.

Therefore be it ordained by the City Council of the City of Fairfield, Iowa:

Section 1. That William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, hereinafter designated as the grantee or the gas company, be and are hereby vested with the right, franchise and privilege for the term of twenty (20) years from and after the acceptance of this ordinance, to acquire, erect and maintain a gas plant in the city of Fairfield, Iowa, hereinafter designated as The City, for the manufacture and sale of gas for light, heat and fuel, and in connection therewith to use the streets, avenues and alleys of said city, and all streets, avenues and alleys that may hereafter be added thereto, for the purpose of laying down and maintaining in said streets, avenues and alleys pipes for the conveyance of gas in and through said city for the use of its inhabitants and the city and others, provided always that said gas pipes when so laid shall not in any manner interfere with the drainage of said city or the construction of

sewer or underground ways for the conveyance of water, or with any other improvement the city may make upon or in said streets, avenues, alleys and public places; and provided further that said gas company shall lay its pipes or mains, and make needed repairs and replacements therein and thereto, on streets which are being repaved or about to be paved in advance of the work of paving or repaving said streets, upon reasonable notice from said city; and provided further that nothing herein shall be construed as giving the said gas company an exclusive franchise or prevent the said city from granting any other company or gas companies franchises over the streets, avenues, alleys or public places of the city.

Section 2. That whenever said gas company proposes to open any streets, avenues or alleys for the purpose of laying down gas mains or pipes, said company shall give the city council, or member thereof having charge thereof, twenty-four (24) hours notice in writing of its intention so to do, which notice shall be accompanied by a plat, if requested, of the street, avenue or alley, upon which it proposes to lay its mains or pipes, specifying the proposed position its mains or pipe will occupy in said street, avenue or alley, the depth below the surface the same shall be laid, and the kind of material, the number thereof having charge of the same shall then give to said company its permit for so doing, and said company shall not unnecessarily during the progress of its work, obstruct the passage of such street, avenue or alley, and further shall within a reasonable time repair such portions of said street, avenue or alley, as it may have entered upon in such manner as it may have found it, such work of opening and closing said street, avenue or alley, to be done at all times under the supervision of, and subject to, the approval of the city Council, or member thereof, having charge of the same, or other duly constituted officer having charge thereof. All the foregoing provisions shall apply to entry, opening or closing of any street, avenue or alley for the purpose of connecting service pipes to the mains or pipes of said company at any time, and said company shall at all times be required to use all necessary means to repair streets or pavements of every kind so as to bring the same to grade and have same to grade at all times.

The gas company shall extend its mains for customers in all cases where bona fide customers apply in writing to be supplied with gas, and agree in their applications to purchase gas from the company, for use for light, heat or fuel, for a period of not less than two years, but there shall not be less than one customer for each one hundred (100) feet of main required to be laid to serve said applicants.

Section 3. The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

On bills rendered for monthly consumption, the rates shall be as follows:

For the first 3,000 Cubic feet, $1.375 per thousand cubic feet;
For the next 3,000 Cubic feet, $1.325 " " " "
For the next 6,000 Cubic feet, 1.275 " " " "
For the next 6,000 Cubic feet, $1.20 " " " "
For the next 6,000 Cubic feet, $1.10 " " " "
For the next 6,000 Cubic feet, 1.05 " " " "

For all consumption over 30,000 cubic feet $1.00 per thousand cubic feet, provided, however, the gas company will be allowed to charge a penalty of five cents (5c) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

The rates which grantee is entitled to charge for service from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa.

Section 4. The company shall not be required to install a meter where the applicant therefor is indebted to the company for services previously rendered to him by the company.

Section 5. The gas furnished by the gas company shall be of not less than fourteen (14) candle power, of the equivalent of Standard English Sperm candles when tested on the London Metropolitan Burner, and not less than five hundred and fifty (550) British Thermal Units per cubic foot, and the monthly average shall not be less than five hundred and sixty-five (565) British Thermal Units per cubic foot, and the gas supplied shall at all times be practically free from sulphuretted hydrogen.

The grantee, if requested by the city shall at its own expense install and maintain in its works or office a calorimeter of standard manufacture or other device of equal efficiency for testing the quality of gas and the authorized agents of the city shall at all reasonable hours have access thereto for the purpose of conducting tests of the gas being furnished by the grantee so as to determine its quality. If the average number of heat units of the gas furnished by the grantee for any month as shown by weekly tests is less than five hundred and sixty-five (565) British Thermal Units per cubic foot, then the bills of all consumers for said month shall be reduced in the direct ratio which said deficiency bears to five hundred sixty-five (565).

The gas company, at its own expense, shall install in the city hall

a pressure gauge connected with the gas main in the streets,
26 which will indicate and record the pressure in the street main at all hours of the day. Said gauge to be in charge of a duly appointed official or employee of the city, and be maintained in constant operating condition by said official, or employee, so designated by the city.

The pressure shown by said gauge, in the city hall shall never be less than one and one-half (1½) inches nor more than seven (7) inches of water pressure and the daily variation of pressure at said gauge shall never be greater than one hundred per cent (100 per cent) of the minimum pressure.

Section 6. The gas and service furnished by said Company shall be further subject to such reasonable regulation and control as may be determined by ordinance of said city during the term of the franchise hereby granted.

Sec. 7. The city reserves the right to, by ordinance, provide the reasonable rules and regulations governing the manner in which the said gas company shall install its mains and connections and make repairs thereto.

Sec. 8. The privileges herein granted in the preceding Sections are made upon the condition that said gas company shall at all times, unavoidable accidents only excepted, hold itself in readiness to furnish, and shall furnish, all gas required by the said city, and the inhabitants thereof, as hereinbefore specified and shall at all times, fully insure, indemnify and save harmless the city of Fairfield, from all causes of action or litigation, or damage of any kind, claims for which may be made against the city, and from all loss or damage of any kind which may be sustained by any person, firm or corporation by reason of the present or future use or occupancy of any street, avenue or alley or by reason of defective, negligent or imperfect closing of all openings made by it in said streets, avenues or alleys, and shall permanently maintain good, complete and substantial gas works, and shall at all times conform with, submit to and carry out any ordinance now in force or that may hereafter be enacted not inconsistent herewith, for reasonably regulating or controlling the use of the streets, avenues or alleys, by said gas company.

Upon written demand of any consumer any meter shall be tested by the City in such a manner as the City Council may provide by ordinance and in case such meter shall be found to be incorrect to the extent of two per cent (2%) variation, or more, the expense of the testing thereof shall be borne by the grantee, and the account of the consumer for the three months next preceding the test shall be adjusted upon the basis of the error found on such inspection, but said company shall receive reasonable notice of the time and making of said test. In case such meter shall be found to be correct within two per cent (2 per cent) the inaccuracy shall not be considered an error and the cost of the test shall be borne by the consumer.

Section 9. The grantee shall at the request of the consumer, install by the side of the consumer's meter a printed card upon which the monthly readings of such meter and the date thereof shall be entered by the employee reading the same upon the date that the reading is made, and the meter reading shown upon said card shall be conclusive upon the grantee as to the state of the meter upon the date the same was read.

Section 10. This ordinance permits grantee herein, to purchase the existing gas plant in the City of Fairfield with all its appurtenances, rights and privileges, and as soon after said purchase as practicable grantee shall install necessary apparatus for making and proper purification of gas to ensure to the City and the inhabitants thereof an ample supply of gas of required quality.

Section 11. The grantee shall, and by acceptance of this franchise, agrees to expend within twelve months (12) from date of accept-
27 ance of its franchise at least Ten Thousand Dollars ($10,000) and shall within the following twelve (12) months expend an additional Ten Thousand Dollars ($10,000)—making an expenditure of at least Twenty Thousand Dollars ($20,000) within twenty-four months for the building, improving and extending of its plant and distributing system of its gas properties within the city of Fairfield.

Section 12. This ordinance shall be of full force and effect from and after its passage and adoption by the legal voters of Fairfield, Iowa, at the special election to be held Tuesday, January 30th, 1917, and the Mayor and City Clerk are hereby authorized and directed to do all things required by the Statutes of Iowa, and ordinances of the city for the lawful submission of the question of the passage and adoption of this ordinance to the legal voters of the city of Fairfield, Iowa, at said special election.

Section 13. The grantee herein shall within thirty days after the passage and adoption of this ordinance by the legal voters of the city file with the city clerk its written acceptance of said ordinance.

Passed this 15th. day of December 1916.

D. F. SPRATT,
Mayor.
W. R. HEFLIN,
City Clerk.

28 And said Dows, Smith and Reed requested the said City Council to adopt said ordinance and call a special election of the voters of said city to vote upon the same, and the said City Council did call and for that purpose hold a special election on the 30th day of January, 1917, in which a ballot containing said ordinance in full was submitted to the legal voters of said city upon the following interrogatory: Shall the following ordinance granting a gas franchise to William G. Dows, Isaac B. Smith and John A. Reed, their successors and assigns, be adopted?

2. That a majority of the legal voters of said city voted at said special election in the affirmative on said question, and on the 3rd day of February, 1917, the said Dows, Smith and Reed, filed their written acceptance with the Clerk of said City and the same was entered of record, as follows:

Acceptance of Franchise.

William G. Dows, Isaac B. Smith and John A. Reed, for themselves, their successors and assigns, do hereby accept the ordinance of the City of Fairfield, Iowa, entitled:

"An ordinance granting rights and franchises to William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, for furnishing gas for light, heat and fuel, *the* the City of Fairfield, Iowa, and the inhabitants thereof, and for acquiring, erecting and maintaining a gas plant in said city, therefor," and the rights, powers and privileges conferred upon the said grantees therein named.

In witness whereof, the said William G. Dows, Isaac B. Smith and John A. Reed have duly executed these presents on this 31st day of January, A. D. 1917.

WILLIAM G. DOWS,
ISAAC B. SMITH,
By WILLIAM G. DOWS,
His Attorney in Fact.
JOHN A. REED.

29 3. That the said City of Fairfield, Iowa, or the City Council of said City is not now, and has not since the granting of said Franchise, attempted to establish the rate contended for, but are only attempting to enforce the contract entered into by the City and the said Dows, Smith and Reed, and their successors, the Iowa Electric Company, the plaintiff herein.

4. That because of the foregoing facts there is no Constitutional question involved, and hence no jurisdiction in this Court to grant the relief prayed, or any other relief.

5. The defendants, and each of them further aver that a short time prior to the presentation of said proposed ordinance by said Dows, Smith and Reed, as aforesaid, The Interstate Power Company's grantor, or assignor, R. M. Burtis, presented to the City Council of Fairfield, Iowa, an ordinance for a franchise for a similar purpose, and upon submission of said ordinance to the legal voters of said City the same was overwhelmingly defeated, and the said Burtis, who was President of the Interstate Power Company, assigned his rights under an old franchise, which was about to expire, to the said Interstate Power Company, who in turn assigned all of their rights to the said Dows, Smith and Reed, upon the condition that said Dows, Smith and Reed should be able to obtain a new franchise, and that one of the leading inducements published and held out to the said City and the legal voters thereof, to obtain said franchise, was that they and their successors would furnish gas at the rates specified in

said proposed ordinance for a period of three years from and after the acceptance of said ordinance by them, and said proposed ordinance would undoubtedly have been defeated at said election had it not contained said provision and condition, and it would not be equitable to now permit said grantees or their successors to retain said franchise without complying with the conditions and terms upon which they obtained the same.

30 6. And these defendants further aver that they have been informed and believe that in direct violation of said terms and conditions, and without the knowledge of any of these defendants, the said plaintiff and its officers and employees have been setting their pre-pay meters in such manner that their patrons were charged for gas at the rate of $1.48 per 1060 cu. ft. for gas consumed by them instead of the rate specified in said franchise, and that in violation of the said terms and conditions of said franchise the plaintiff has been charging the sum of 75¢ each for installing its meters for said patrons, whereas such charge is not permissable under said franchise.

7. That for the reasons set forth in the last two preceding paragraphs the said plaintiff is not coming into this court with clean hands, and is therefore not entitled to relief at the hands of any court of equity.

Wherefore the defendants pray that said application for a Temporary Writ of Injunction be denied, and that upon a hearing of said cause the complaint be dismissed at the costs of the plaintiff.

X. C. NADY,
RALPH H. MUNRO,
Attorneys for Defendants.

31 *Marshal's Return.*

The within objections and resistance came into my hands for service on the 20th day of May, 1918, and I certify and return that I personally served the same upon the within named Wm. Chamberlain, John A. Reed and Wm. Smyth by delivering to them a true copy of the same at Cedar Rapids, Ia., on the 20th day of May, 1918.

E. R. MOORE,
U. S. Marshal, Northern District of Iowa.
By M. L. HEALY,
Deputy.

We and each of us accept legal service of the within objection and resistance.

WM. CHAMBERLAIN,
JOHN A. REED,
WM. SMYTH,
Solicitors for Complainants.

32 And thereafter to-wit: On the 16th day of September 1918 there was filed in said cause Memorandum Upon Application for Temporary Injunction which is in words and figures as follows to-wit:

33 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

CITY OF FAIRFIELD et al.

Memorandum Upon Application for Temporary Injunction.

For the reasons stated in Memorandum Opinion filed in Peoples Light Company v. City of Davenport, there will be a temporary injunction allowed in this case. And with reference to the maximum rate to be permitted under such order, I am making the same order as in the Davenport case with reference to further showing. The Clerk will enter the following

Order.

And now on this 16th day of September, 1918, in the above entitled case, the application for a temporary injunction having been heretofore submitted, it is now ordered and adjudged that the plaintiff may, within five days file additional showing as to the maximum rate which should be allowed—copy of which shall be served upon the defendants by sending the same by mail to counsel for defendants; and defendants will have five days in which to file additional showing upon that issue.

Witness my hand this 16th day of September, 1918.

(Sgd.) MARTIN J. WADE,
Judge.

Filed September 16, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

34 And thereafter to-wit: On the 10th day of October A. D. 1918 there was filed in said cause an Order appointing William G. Raymond, Special Master which is in words and figures as follows to-wit:

35 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

CITY OF FAIRFIELD et al.

Order.

And now on this 28th day of September, 1918, in the above entitled case, William G. Raymond is hereby appointed Special Master to examine the affidavits and further showing on file herein, with reference to the maximum rate which should be fixed by the court in granting temporary injunction in this case; and upon such showing of the respective parties herein, the said Master will determine and report the maximum rate which, upon showing, the plaintiff shall be permitted to collect, pending final hearing herein. The Master in making such finding and report, will be guided by the fact that the plaintiff is entitled to an order permitting it to collect such sum as, upon the showing made, said plaintiff may be able to establish upon the trial as the maximum reasonable rate.

Such finding and report by the Master is intended as a guide to the court in determining said rate in its order for temporary injunction.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

36 And thereafter to wit: On the said day October 10, 1918, there was filed in said cause a Report by Wm. G. Raymond, Special Master, which is in words and figures as follows, to wit:

37 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD et al.

Report of Special Master Appointed to Determine the Maximum Rate That the Plaintiff May be Permitted to Collect Pending Final Hearing Herein.

In the above entitled case, upon consideration of the showing of the respective parties on file, I find, that the maximum net rate which the plaintiff can fairly demand pending final hearing, is the sum of $2.00 per thousand cubic feet of gas sold; provided, however, that

there shall be a customer charge of 30 cents per month in addition to the charge for gas used, collected from each customer served through a standard meter, and that prepay meters shall be set to collect at a rate not exceeding $2.30 per thousand cubic feet, with no customer charge to be collected from customers served through such meters.

In lieu of the rate above given for customers served through standard meters, a maximum rate of $2.20 per thousand cubic feet without any additional customer charge may be fixed as that fairly to be demanded by the plaintiff, pending final hearing.

(Sgd.) WM. G. RAYMOND,
Special Master.

(Endorsed:) Filed October 10, 1919. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

38 And thereafter to wit: On the same day October 10th, 1918, there was filed in said cause a Memorandum by Martin J. Wade, Judge which is in words and figures as follows to wit:

39 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD, IOWA, et al.

Memorandum.

In view of the radical difference between the claims of counsel as to what should be the maximum rate permitted pending final hearing, I appointed Dean William G. Raymond, Special Master, to go through the facts presented in the various statements and affidavits, and to make report to me of his findings, as to what maximum rate should be fixed. He has so reported. A copy of the Order, and of his Report, is hereto attached.

I have made an order in the usual form, providing for a bond which will fully protect all persons paying this maximum rate, if the same is not finally adjudged to be reasonable. The general rule is not to require a deposit of the money in a bank instead of securing the same by bond, without the consent of the parties. The Company is required to pay 6 per cent interest upon any money refunded, and it would not be just to require payment of interest upon money deposited in a bank. So that justice to both parties requires that the Company shall have the use of the money, and that the other party shall have ample security.

I have not included an order appointing a Master herein, for the reason that it is my present purpose to set this case for hearing upon

the issue presented by the pleadings as to whether the rate
40 fixed in the Ordinance, as plead by the defendant, is binding upon the plaintiff. I see no reason why, if the plaintiff cannot maintain the action because such rate is valid and binding, for putting the parties to the expense of going through a long hearing upon the rate question.

But before I make such order, I will receive from either party, objections to such order. By determining that question first, if it should be adverse to the plaintiff, the matter can be speedily presented to the higher court, and speedily determined. I would like to have such objections within five days.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1918. Wm. C. McArthur, Clerk, by Gertrude Darrell, Deputy.

41 And thereafter to wit: On the same day, October 10th, 1918, there was filed in said cause an Order granting a Temporary Injunction which said order is in words and figures as follows to wit:

42 In the District Court of the United States for the Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD et al.

Order.

And now on this 7th day of October, 1918, after full consideration of the facts and the report of the Special Master, it is ordered and adjudged that temporary injunction issue as prayed, conditioned that the plaintiff shall not collect in excess of 45 per cent advance upon the rates fixed by the ordinance upon conditions named in ordinance.

Conditioned however, that the excess collected over the present rates shall be deposited in a bank in the City of Fairfield (the plaintiff consenting thereto) to be held until final determination of the question as to what a reasonable and just rate is and to be returned to the consumer in such amount as may be over a fair, reasonable and just rate.

Counsel for plaintiff will prepare order and send copy to Counsel for defendant and endeavor to agree with Counsel as to bank to hold the funds and the condition upon which the bank shall hold the same as to interest, etc.,

Witness my hand,

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1919. Wm. C. McArthur, Clerk. By Gertrude Darrell, Deputy.

43 And thereafter to wit: On the same day, October 10th, 1918, there was filed in said cause an Order for Temporary Injunction which is in words and figures as follows to wit:

44 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MONROE, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady as City Attorney; R. H. Monroe, W. H. Conner, W. R. Baker, Defendants.

Order for Temporary Injunction.

On the 10th day of September, 1918, the Complainant, by its solicitors, John A. Reed, William Smyth and William Chamberlain, presented to me in Chambers at Davenport, Iowa, its bill of complaint under oath which is on file with the Clerk of this Court, wherein a temporary injunction is prayed upon the facts therein alleged against defendants, the City of Fairfield, Iowa, R. H. Monroe, Mayor; J. W. Price, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Monroe, W. H. Conner and W. R. Baker as representatives of all the taxpayers and gas consumers within said City of Fairfield, Iowa, as a class, enjoining and restraining said defendants and each of them from enforcing an ordinance of the said City of Fairfield, Iowa, alleged to have been passed, approved and published by said City under authority of the laws of the State of Iowa on or about the 30th day of January, 1917, and now
45 in force, and it being shown that due and reasonable notice of the presentation of said Bill of Complaint to me in Chambers at Davenport, Iowa, on said 10th day of September, 1918, was served on all of the Defendants, the City of Fairfield, Iowa, and R. H. Monroe, Mayor; J. W. Price, J. F. Deardurff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Monroe, W. H. Conner, W. R. Baker as representatives of all the taxpayers and gas consumers within said City of Fairfield, Iowa, and thereupon after argument by the solicitors of Complainant, the matter of issuing the Temporary Injunction herein was taken under advisement by the Court.

And now to wit on this 7th day of October, 1918, upon due consideration of said Bill of Complaint and facts therein alleged by the Complainant, it is ordered and adjudged that a Temporary Injunction issue against the Defendants and each of them and

their successors in office, and against all of the tax payers and gas consumers of the City of Fairfield, Iowa, as a class, forbidding them from putting into effect any of the provisions of said ordinance Number 192 of said City of Fairfield, Iowa, complained of in the Complainant's said Bill of Complaint or of any other ordinance of said City, wherein the rate or rates to be charged for gas by the Complainant in the City of Fairfield, Iowa, is less than the rate or rates specified in said Ordinance Number 192 of the said City of Fairfield, with forty-five (45) percentum of said rate or rates so specified in said Ordinance added thereto, said rates specified in said Ordinance being as follows, to wit:

"On bills rendered for monthly consumption, the rates shall be as follows:

"For the first 3,000 cubic feet, $1.375 per thousand cubic feet.

"For the next 3,000 cubic feet, $1.325 per thousand cubic feet.

46 "For the next 6,000 cubic feet, $1.275 per thousand cubic feet.

"For the next 6,000 cubic feet, $1.20 per thousand cubic feet.

"For the next 6,000 cubic feet, $1.10 per thousand cubic feet.

"For the next 6,000 cubic feet, $1.05 per thousand cubic feet.

"For all consumption over 30,000 cubic feet, $1.00 per thousand cubic feet; provided, however, the gas company will be allowed to charge a penalty of five cents (5¢) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered.

"The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises or the customer to remove the meter from the premises."

And the said Defendant city, its officers, servants, agents, attorneys, and their successors in office, if any there shall be, are further enjoined and restrained until the final determination hereof attempting by criminal or other legal proceedings to enforce against the Complainant, its officers, agents and attorneys, or other employees any of the penalties provided for by any ordinance of the City of Fairfield, Iowa, which may provide penalties for the violation of said ordinance Number 192 complained of in Complainant's said Bill of Complaint.

It is further ordered that the said Writ of Injunction shall forthwith issue by the Clerk of this Court under its seal against the said City of Fairfield, Iowa, R. H. Munroe, Mayor; J. W. Price, J. R. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, R. H. Munroe, W. H. Conner, W. R. Baker as representing all the tax-payers and gas consumers of the said City of Fairfield, as a class named in the Bill of Complaint, enjoining said City of Fairfield, Iowa,

47 and all the other Defendants named therein; also all persons included in that class of persons represented by the said R. H. Munroe, W. H. Conner, and W. R. Baker, as hereinbefore ordered,

and forthwith deliver said Writ to the Marshal of this Court to be served by him on said Defendants.

It is further ordered that all sums of money in excess of the rates fixed in the Ordinance hereinbefore described, collected by the Complainant for the sale of gas within the City of Fairfield, Iowa, from and after the date of the commencement of this suit, shall be from month to month as collected, deposited by Complainant in the First National Bank of Fairfield, Iowa, as Trustee as funds in court. The Trustee shall pay interest upon said funds so deposited at the rate of four per cent per annum, provided that rate conforms to the present regular practice of allowing and paying interest upon savings accounts in the banks of the said City of Fairfield, Iowa, and such interest shall accrue to and become a part of said funds in Court.

If, upon final adjudication it is found that said Ordinance is void and of no force and effect that the amount collected is in excess of a just and legal rate, the Court will then order the Trustee to repay the persons paying the same all sums paid by them in excess of such just and legal rate together with the accumulated interest thereon, and the balance, if any, remaining in said funds will be paid to the Complainant or as this Court may order or direct. But in case it be determined upon final adjudication that said ordinance Number 192 is valid and that the rates therein fixed are lawful, then the Trustee will repay to the persons from whom sums have been collected in excess of the rates fixed in said ordinance Number 192 all of said excess together with the accumulated interest thereon.

48 It is further ordered and directed that said funds remain at all times as funds in Court subject to such further orders and directions as to the disposition to be made thereof, as shall at any time in the future seem to the Court to be just, fair and equitable, or as shall be demanded by the future proceedings of this cause.

Witness my hand this 7th day of October, 1918.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 10, 1919. Wm. C. McArthur, Clerk.

49 And thereafter to-wit: On the 19th day of October, 1918, there was filed in said cause an Order relating to the issue in said cause which order is in words and figures as follows to-wit:

50 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY

vs.

CITY OF FAIRFIELD et al.

Order.

And now on this 19th day of October, 1918, for the reasons stated in memorandum this day filed in the Muscatine Lighting Company v. The City of Muscatin, the Court Orders and Directs, that the issue raised by the answer wherein it is pleaded that a certain ordinance rate is binding, and that the Court has no power to advance such rate, is set for hearing as a separate issue in advance of the hearing upon the question as to what is a reasonable and legal rate, and such issue as to the force and effect of the ordinance pleaded, will be heard at such time as the Court may hereafter fix.

To this order the plaintiff excepts.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed October 19, 1918. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

51 And thereafter to-wit: On the 24th day of March, A. D. 1919, there was filed in said cause a Memorandum Opinion by Martin J. Wade, Judge which is in words and figures as follows to-wit:

52 In the District Court of the United States for the Southern District of Iowa.

IOWA ELECTRIC COMPANY

vs.

THE CITY OF FAIRFIELD.

Memorandum Opinion.

(1.) I cannot do more at this time than to briefly record the conclusions which I have reached after the extensive and helpful arguments presented in these cases. Any attempt to review the wilderness of authorities cited, or to distinguish between apparently conflicting opinions of the Courts, would be fruitless, even if I had the time.

The most of the cases at bar involve the question as to whether a specific provision in a franchise ordinance fixing the price which shall be charged by the grantee of the franchise, is binding upon such grantee. It is not disputed that such provision is subject to

modification by the city under its general power to "regulate and fix" rates.

It is earnestly contended that the power to "regulate and fix," excludes the power of the city to contract. This may be granted
53 so far as a contract binding on a city is concerned; but I cannot agree that there is any limitation upon the power of the city to "regulate and fix" by contract, as well as by ordinance or resolution.

It is a general rule with relation to the exercise of power by a city, that "if the mode of exercise is not prescribed in the Act or Charter conferring the power, or in some other statute, the corporation may exercise the power in any usual and appropriate manner, according to its own discretion. 28 Cyc. 275, and authorities cited.

"This statute expressly confers on cities and towns, the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised, is left to the discretion of the corporation, subject however, to the general rule, that the ordinance must be reasonable. The power given in substance is to regulate, and this implies that the corporation is empowered to do all things essential to the proper exercise of the power expressly conferred." Davis v. Town of Anita, 73 Iowa, 325.

In the State of Iowa, a city is given the power to grant franchises without any limitation, except that such franchise shall not extend more than twenty-five years, and that no exclusive franchise shall be granted. When this law was passed, it was, and still is, the well settled rule, that "when a municipal corporation has the power to grant or refuse, in its discretion, permission to a public service company to occupy the streets with its structures, whether such permission be called a franchise, a license, a permit, or a mere designation of the streets to be occupied, it may grant such permission, subject to such conditions as it sees fit to impose." 19 R. C. L. page 1153, Par. 427. Of course such conditions must not be against law or public policy.

The city having the power to grant a franchise, the right to impose conditions, is limited only by the terms of the grant of the power. Therefore it is self evident that unless other legislation, and especially sec. 725 of the Code of Iowa, limits the power with
54 reference to conditions to be imposed in granting franchise, a provision as to maximum rates would be binding.

Section 725 confers the power to "regulate and fix", but it does not specify how such power shall be exercised; and under the rule above stated, it has the power to use its own discretion as to how such power shall be exercised.

In Miller v. City of Webster City — Iowa — 62 N. W. 648, Judge Deemer says:

"As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities, and contains no limitations upon the power granted, the time, manner and expediency of its exercise, are left to the discretion of the corporation; and the judgment of its officers upon such matters can-

not be controlled by the courts, so long as they act within the scope of their authority. The discretion of a municipal corpoartion within the sphere of its powers, is as wide as that possessed by the government of the State, subject however, to the general rule that the ordinances must be reasonable. The action of the City Council in the exercise of expressly delegated powers, cannot be questioned upon the ground that it is in conflict with public interest."

The term "regulation" is very broad. It is said that an ordinance "is not so comprehensive as 'regulation', and is more solemn and formal than 'resolution' ". 28 Cyc. 348.

Judge Shiras in Kimball v. City of Cedar Rapids, 100 Fed. 802, uses the words, "A contract regulating the rates to be charged
55 by the Company."

It ought to be a fair inference that if the legislature intended to limit the exercise of the power to "regulate and fix", to conditions expressed by Ordinance, that it would have so stated. We must always bear in mind in dealing with municipal problems, that the powers of a municipality are not always exercised with formality, and I feel that this fact is kept in mind in the enactment of legislation for cities and towns.

Of course, any contract regulating rates, must be in the nature of things, "one sides," so far as the rate is concerned. This is true because the city reserve- to itself the power to change the rate at any time, subject only to the general rule that the new rate fixed must be reasonable.

But I see no objections to a contract understandingly made which provides that the city shall charge a maximum rate which shall continue until such period as the same becomes unreasonable, and that at such time the city reserves the right to modify the same.

Opposed to the foregoing views, counsel presents strong reasons in public policy, why the law should not be so construed. Of course, the matter of public policy can only be considered here, in an effort to construe the legislation. There are sound reasons in public policy, why the city should not be allowed to bind the corporation by a contract for a rate which does not bind itself; but there are other opposing reasons in public policy, which to my mind overcome every suggestion in support of the contention of the utilities companies. It is a matter of common knowledge that franchises are frequently granted—sometimes after spirited competition, and often after bitter controversy, which franchises contain a definite provision, that, during the term of the franchise, no more than
56 a certain sum named shall be charged for public service.

There can be no question, that heretofore, the people voting upon franchises, have believed such conditions to be valid, and I must assume that utility companies acquiring franchises containing such conditions, also assumed that such conditions were valid.

It is of the highest importance, that the confidence of the people in the law, and especially in the sacredness of contracts, shall not be weakened. Every franchise, and every power, under legislation, is construed most strongly against the grantee of a franchise. It is

self-evident that to now hold that conditions relating to rates solemnly agreed to are without force, would have a strong tendency to undermine the confidence of the public in the law, and would have a tendency to put utility companies under suspicion of repudiating their obligations.

There is much force in the suggestion, that regulation by contract should be permitted, especially with reference to smaller towns which cannot well afford the investigation and the trial of the question of the reasonableness of rates from time to time, and I believe it would be in the interest of said communities, to have a law permitting a contract binding both sides as to rates, for reasonable periods of time, say, three, or five years. This would stabilize conditions for the utility company and the city or town, and avoid expensive and unpleasant controversies.

It is of course important that utility companies shall receive reasonable compensation for what is furnished. Upon the showing before the Court, (which for the trial of this issue I assume to be true), it is apparent that some of these companies cannot continue under the contract rates, because they have no source of income, except the money received for the commodity furnished, and
57 war conditions have radically increased the cost of production, so that a rate fixed at the time a franchise was granted a few years ago, may be utterly inadequate at the present time to pay even current expenses; but these are conditions which the Court cannot relieve, as has been recently held in Columbus Co. v. City of Columbus, 253 Fed. 499, and other cases.

(2). But there are other considerations. These cases are brought upon the claim that because the rates are confiscatory, the utility companies are deprived by the State of property, without due process of law, and that they are denied the equal protection of the law.

The Fourteenth Amendment to the Constitution of the United States, provides—"nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of its laws."

The State, (and the municipality, which is an arm of the State) shall not "deprive any person," etc. At the foundation of these cases, is the problem as to whether upon the facts, the State, or the Municipality has deprived the utilities companies of property, without due process, or, whether the State or Municipality, is denying the "equal protection of its laws."

The courts are ever ready to enforce the provision of the Constitution of the United States; but in order to interfere with State or municipal legislation, it must appear that there is some affirmative act which constitutes the "deprivation," or the "denial," specified in Article 14.

58 When an ordinance is passed by a city council, under authority of the State, it is an act of the State, and if it deprives one of his property without due process, or denies equal protection, the act will be enjoined, for the Constitution is sacred, and must under all circumstances, be upheld.

But has the State, or the Municipality, in these cases, done any act which violates the Constitution, except in so far as such act has been consented to by the Companies?

It is fundamental that every individual, constitutional right, may be waived.

"A person may, by his acts, or omission to act, waive a right which he may otherwise have under the provisions of a constitution; and where such acts or omissions have intervened, a law will be sustained which otherwise might have been held invalid, if the party making the objection, had not by prior acts, precluded himself from being heard in opposition; thus a person who has participated in proceedings under a Statute, or who has acted under the statute and in pursuance of the authority conferred by it, or who has claimed the benefit of the statute to the detriment of others, or who asserts rights under it, may not question its constitutionality." 12 Corpus Juris, p. 769, Sec. 190, etc. —, and cases cited.

Even in criminal cases, "those constitutional guarantees which are in the nature of personal privileges of the accused, may be waived by him, and therefore he may not question the constitutionality of a statute under which he has made such a waiver." 12 Corpus Jur. 774, Sec. 203.

It must be apparent that if the confiscatory rate is fixed, not by the municipality, but by the utility company, that the State has done no act "depriving" the company of its constitutional rights. It must likewise be apparent, that if the rate is the joint act of the utility company and the city,—if the utility company has consented to the rate, that it has waived the constitutional right which it might otherwise assert, and I am convinced that if a rate is fixed by agreement of the utility company which at the time, is
59 a reasonable rate, but which thereafter becomes confiscatory, without any act of the State, but simply as a result of industrial conditions, that the prohibition of the Fourteenth Amendment upon the State, is not violated by the State.

This is serious business, restraining the sovereign act of a state. There is no constitutional guarantee of compensatory rates. So far as income and profits are concerned, the utility corporation stands—exactly in the same position as the building corporation, or the street improvement company. It may make money—it may lose money, but only when the State has acted affirmatively, to the deprivation of reasonable income upon actual investment, can constitutional guarantee be invoked; and where the utility company consents to the act of the State, there is not that "deprivation" or "denial" which the Constitution forbids.

So that I am satisfied that the utility companies are bound by these contracts.

I realize of course the hardships which this construction imposes. I realize that it is inequitable to expect a utility company to furnish service which cannot be paid for out of the income. It may not be here inappropriate to quote from the opinion in the Columbus Railway case Supra:

"It cannot be denied, on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor Board in the wage controversy, cannot be regarded otherwise than binding on the company, and the increase of wages granted by the company pursuant thereto, cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions finance any improvements required to meet new demands for heat, light, and power, or for increased street railway facilities, and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

60 "Prolonged operation under these conditions would seem to be a manifest impossibility, and must result in impairing the street railway service and grievously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound public policy forbids usurpation by the courts of governmental power lodged in other departments of the government. No power inheres in a court, either to make contracts for parties, or to absolve them from the effect of their contracts, provided the parties are competent in law to contract, and no fraud intervenes in the making thereof.

In view of these well recognized limitations of the court's power, I can only suggest that the present emergency, likely as it is to become much graver in the near future, calls urgently for some kind of accom-odation or temporary compromise between the parties."

Much of the controversy in these cases arise out of a misunderstanding between the utility companies and the people of the communities which they serve. There ought not to be any misunderstanding. The public should interest themselves sufficiently to understand definitely the view-point of the company, and it is not too much to hope that in these cases, where existing contracts by virtue of war conditions, imposed grave hardships, that temporary arrangements may be made by which the situation may be solved for the time being.

The Record in These Cases.

These cases have been set down for trial by order of the court, upon the issue as to the validity of the contracts. I am not sure that the record is in shape to present this issue appropriate for review in the higher court. Of course, I have assumed, and counsel have assumed, for the sake of this question, that the contract rates are confiscatory, but I am not sure that the record justifies this assumption.

To save any possible question, in the interest of all parties, it ought to be admitted of record, for the purpose of this hearing, that the contract rates in each individual case, are confiscatory. So im-

portant is this in my present view, that I feel that it would be necessary to take testimony upon this point, unless it is handled
61 by a stipulation.

I therefore suggest, that counsel for the plaintiffs in these cases, prepare a stipulation which they feel will make the record, and submit it to counsel for the Company, and by mutual co-operation, I am satisfied that without waiving anybody else's rights, the record can be completed. In this way the matter can be presented to a higher court without much expense, and with more satisfaction in the consideration of the question involved.

After this is done, the court will enter an order of record, and will at that time hear counsel for the plaintiffs upon their request for a continuance of the restraining order, pending appeal. Application for such continuance to be prepared and served upon counsel, as the rules of this court provide.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed March 24th, 1919. Wm. C. McArthur, Clerk, by Louis J. Adelman, Deputy.

62 And thereafter to-wit: On the 24th day of May A. D. 1919 there was filed in said cause an Amended and Substituted Answer which is in words and figures as follows to-wit:

63 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNROE, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Munro, W. H. Conner and W. R. Baker, Defendants.

Amended and Substituted Answer.

Now comes the defendants above named, and each of them, by their attorneys X. C. Nady and Ralph H. Munro, and for answer to the petition or bill of complaint of the plaintiff, or complainant, state:

Count One.

1. That on or about the 15th day of December, 1916, the City Council of the City of Fairfield, Iowa, did at the instance and request of the following named persons, to-wit: William G. Dows, Isaac B. Smith and John A. Reed, pass an ordinance in words and figures as follows:

64

Ordinance No. 192.

An Ordinance Granting Rights and Franchises to William G. Dows, Isaac P. Smith, and John A. Reed, Their Successors or Assigns, for Furnishing Gas for Light, Heat and Fuel to the City of Fairfield, Iowa, and the Inhabitants Thereof, and for Acquiring, Erecting, and Maintaining a Gas Plant in said City.

Therefore be it ordained by the City Council of the City of Fairfield, Iowa:

Section 1. That William G. Dows, Isaac B. Smith, and John A. Reed, their successors or assigns, hereinafter designated as the grantee or the gas company, be and are hereby vested with the right, franchise and privilege for the term of twenty (20) years from and after the acceptance of this ordinance, to acquire, erect and maintain a gas plant in the city of Fairfield, Iowa, hereinafter designated as The City, for the manufacture and sale of gas for light, heat and fuel, and in connection therewith to use the streets, avenues and alleys of said city, and all streets, avenues and alleys that may hereafter be added thereto, for the purpose of laying down and maintaining in said streets, avenues and alleys pipes for the conveyance of gas in and through said city for the use of its inhabitants and the city and others, provided always that said gas pipes when so laid shall not in any manner interfere with the drainage of said city or the construction of sewer or underground ways for the conveyance of water, or with any other improvement the city may make upon or in said streets, avenues, alleys and public places; and provided further that said gas company shall lay its pipes or mains, and make needed repairs and replacements therein and thereto, on streets which are being repaved or about to be paved in advance of the work of paving or repaving said streets, upon reasonable notice from said city; and provided further that nothing herein shall be construed as giving the said gas company an exclusive franchise or prevent the said city from granting any other company or gas companies franchises over the streets, avenues, alleys or public places of the city.

Section 2. That whenever said gas company proposes to open any streets, avenues or alleys for the purpose of laying down gas mains or pipes, said company shall give the city council, or member thereof having charge thereof, twenty-four (24) hours' notice in writing of its intention so to do, which notice shall be accompanied by a plat, if requested, of the street, avenue or alley, upon which it proposes to lay its mains or pipes, specifying the proposed position its mains or pipe will occupy in said street, avenue or alley, the depth below the surface the same shall be laid, and the kind of material, the number thereof having charge of the same shall then give to said company its permit for so doing, and said company shall not unnecessarily during the progress of its work, obstruct the passage of such street, avenue or alley, and further shall within a reasonable time repair such portions of said street, avenue or alley, as it may have entered

upon in such manner as it may have found it, such work of opening and closing said street, avenue or alley to be done at all times under the supervision of, and subject to, the approval of the city Council, or member thereof, having charge of the same, or other duly constituted officer having charge thereof. All the foregoing provisions shall apply to entry, opening or closing of any street avenue or alley for the purpose of connecting service pipes to the mains or pipes of said company at any time, and said company shall at all times be required to use all necessary means to repair streets or pavements of every kind so as to bring the same to grade and have same to grade at all times.

The gas company shall extend its mains for customers in all cases where bona fide customers apply in writing to be supplied with gas, and agree in their applications to purchase gas from the company for use for light heat or fuel, for a period of not less than two years, but there shall not be less than one customer for each one hundred (100) feet of main required to be laid to serve said said applicants.

Section 3. The gas company in consideration of the rights, privileges and franchises herein granted to it, agrees to and shall furnish the inhabitants of the city, gas for lighting, heating and other purposes.

On bills rendered for monthly consumption, the rates shall be as follows:

For the first 3,000 Cubic feet, $1.375	per	thousand	cubic	feet.
For the next 3,000 Cubic feet, $1.325	"	"	"	"
For the next 6,000 Cubic feet, $1.275	"	"	"	"
For the next 6,000 Cubic feet, $1.20	"	"	"	"
For the next 6,000 Cubic feet, $1.10	"	"	"	"
For the next 6,000 Cubic feet, 1.05	"	"	"	"

For all consumption over 30,000 cubic feet $1.00 per thousand cubic feet, provided, however, the gas company will be allowed to charge a penalty of five cents (5¢) per thousand cubic feet if the consumer fails to pay his bill at the office of the gas company on or before the tenth (10th) day of the month succeeding that for which the bill is rendered. Prepay meters shall be installed on request.

The said gas company is also authorized to charge and collect the sum of twenty-five cents (25¢) for a minimum amount of gas used on each meter installed, and until written notice has been given to the company by the owner of the premises of the customer to remove the meter from the premises.

The rates which grantee is entitled to charge for service from and after three (3) years after the acceptance of this ordinance shall be such lawful rates as are fixed by the body authorized to establish rates by the statutes of Iowa.

Section 4. The company shall not be required to install a meter where the applicant therefor is indebted to the company for service previously rendered to him by the company.

Section 5. The gas furnished by the gas company shall be of not less than fourteen (14) candle power, of the equivalent of Standard English Sperm candles when tested on the London Metropolitan

Burner, and not less than five hundred and fifty (550) British Thermal Units per cubic foot, and the monthly average shall not be less than five hundred and sixty-five (565) British Thermal Units per cubic foot, and the gas supplied shall at all times be practically free from sulphuretted hydrogen.

The grantee, if requested by the city shall at its own expense install and maintain in its works or office a calorimeter of standard manufacture or other device of equal efficiency for testing the quality of gas and the authorized agents of the city shall at all reasonable hours have access thereto for the purpose of conducting tests of the gas being furnished by the grantee so as to determine its quality. If the average number of heat units of the gas furnished by the grantee for any month as shown by weekly tests is less than five hundred and sixty-five (565) British Thermal Units per cubic foot, then the bills of all consumers for said month shall be reduced in the direct ratio which said deficiency bears to five hundred sixty-five (565).

The gas company, at its own expense, shall install in the city hall a pressure gauge connected with the gas main in the streets, which will indicate and record the pressure in the street main at all hours of the day. Said gauge to be in charge of a duly appointed official or employee of the city, and be maintained in constant operating condition by said official, or employee, so designated by the city.

The pressure shown by said gauge, in the city hall shall never be less than one and one-half ($1\frac{1}{2}$) inches, nor more than seven (7) inches of water pressure and the daily variation of pressure at said gauge shall never be greater than one hundred per cent (100 per cent) of the minimum pressure.

Section 6. The gas and service furnished by said company shall be further subject to such reasonable regulation and control as may be determined by ordinance of said city during the term of the franchise hereby granted.

Sec. 7. The city reserves the right to, by ordinance, provide the reasonable rules and regulations governing the manner in which the said gas company shall install its mains and connections and make repairs thereto.

Sec. 8. The privileges herein granted in the preceding Sections are made upon the condition that said gas company shall at all times, unavoidable accidents only excepted, hold itself in readiness to furnish, and shall furnish, all gas required by the said city, and the inhabitants thereof, as hereinbefore specified and shall at all times, fully insure, indemnify and save harmless the city of Fairfield, from all causes of action or litigation, or damage of any kind, claims for which may be made against the city, and from all loss or damage of any kind which may be sustained by any person, firm or corporation by reason of the present or future use or occupancy of any street, avenue or alley or by reason of defective, negligent or imperfect closing of all openings made by it in said streets, avenues or alleys, and shall permanently maintain good, complete and substantial gas works, and shall at all times conform with, submit to and carry out any ordinance now in force or that may hereafter be enacted not in-

consistent herewith, for reasonably regulating or controlling the use of the streets, avenues or alleys, by said gas company.

Upon written demand of any consumer any meter shall be tested by the City in such a manner as the City Council may provide by ordinance and in case such meter shall be found to be incorrect to the extent of two per cent (2%) variation, or more, the expense of the testing thereof shall be borne by the grantee, and the account of the consumer for the three months next preceeding the test shall be adjusted upon the basis of the error found on such inspection, but said company shall receive reasonable notice of the time and making of said test. In case such meter shall be found to be correct within two per cent (2 per cent) the inaccuracy shall not be considered an error and the cost of the test shall be borne by the consumer.

Section 9. The grantee shall at the request of the consumer, install by the side of the consumer's meter a printed card upon which the monthly readings of such meter and the date thereof shall be entered by the employee reading the same upon the date that the reading is made, and the meter reading shown upon said card shall be conclusive upon the grantee as to the state of the meter upon the date the same was read.

Section 10. This ordinance permits grantee herein, to purchase the existing gas plant in the City of Fairfield with all its appurtenances, rights and privileges, and as soon after said purchase as practicable grantee shall install necessary apparatus for making and proper purification of gas to ensure to the City and the inhabitants thereof an ample supply of gas of required quality.

Section 11. The grantee shall, and by acceptance of this franchise, agrees to expend within twelve months (12) from date of
67 acceptance of its franchise, at least Ten Thousand Dollars ($10,000) and shall within the following twelve (12) months expend an additional Ten Thousand Dollars ($10,000)—making an expenditure of at least Twenty Thousand Dollars ($20,000) within twenty-four months for the building, improving and extending of its plant and distributing system of its gas properties within the city of Fairfield.

Section 12. This ordinance shall be of full force and effect from and after its passage and adoption by the legal voters of Fairfield, Iowa, at the special election to be held Tuesday, January 30th, 1917, and the Mayor and City Clerk are hereby authorized and directed to do all things required by the Statutes of Iowa, and ordinances of the city for the lawful submission of the question of the passage and adoption of this ordinance to the legal voters of the city of Fairfield, Iowa, at said special election.

Section 13. The grantee herein shall within thirty days after the passage and adoption of this ordinance by the legal voters of the city file with the city clerk its written acceptance of said ordinance.

Passed this 15th day of December 1916.

D. F. SPRATT,
Mayor.
W. R. HEFLIN,
City Clerk.

68 2. That the City Council of the said City of Fairfield, Iowa, did on the 30th day of January, 1917, hold a special election at which said ordinance was set forth in full upon a ballott containing the following interrogatory: "Shall the following ordinance granting a gas franchise to William G. Dows, Isaac B. Smith and John A. Reed, their successors and assigns, be adopted?"

3. That a majority of the legal voters of said city voted at said special election in the affirmative on said question, and on the 3rd day of February, 1917, the said Dows, Smith and Reed, filed their written acceptance of said franchise with the Clerk of said city and the same was entered of record, as follows:

"*Acceptance of Franchise.*

William G. Dows, Isaac B. Smith and John A. Reed, for themselves, their successors and assigns, do hereby accept the ordinance of the City of Fairfield, Iowa, entitled:

An ordinance granting rights and franchises to William G. Dows, Isaac B. Smith and John A. Reed, their successors or assigns, for furnishing gas for light, heat and fuel, to the City of Fairfield, Iowa, and the inhabitants thereof, and for acquiring, erecting and maintaining a gas plant in said city, therefor", and the rights, powers and privileges conferred upon the said grantees therein named.

In witness whereof the said William G. Dows, Isaac B. Smith and John A. Reed, have duly executed these presents on this 31st day of January, A. D. 1917.

WILLIAM G. DOWS.
ISAAC B. SMITH,
By WILLIAM G. DOWS,
His Attorney in Fact.
JOHN A. REED."

4. That the Complainant is the assignee of the said Dows, Smith and Reed, and is operating under and by virtue of the foregoing franchise and acceptance thereof.

69 5. That the City Council of the said City of Fairfield, Iowa, is — now establishing, and has not since the granting of said franchise and its said acceptance, established, or attempted to establish any rate other than as provided and agreed upon in said franchise.

6. That because of the foregoing facts the rates fixed in said franchise for a period of three years from the date of the acceptance

thereof constituted one of the conditions upon which the said franchise was granted, and the acceptance of said franchise by the said Dows, Smith and Reed, made said franchise a valid and binding contract for the rates therein fixed until the expiration of the said three year period, unless sooner changed by the City Council under and by virtue of its power to fix and regulate rates as provided by Statute.

Wherefore defendants ask that complainant's bill be dismissed upon its merits at complainant's costs.

Count Two.

Now come the defendants, and each of them, and for a further answer and defense plead and say that they re-allege each and all of the foregoing facts and statements, and further state that they deny that the rates so fixed in said ordinance are confiscatory, and they deny that said rates so provided do not afford complainant a reasonable return upon the amount of money invested in said project.

Wherefore having fully answered defendants ask that complainant's bill be dismissed at complainant's costs.

X. C. NADY,
RALPH H. MUNRO,
Attorneys for Defendants.

70 STATE OF IOWA,
Jefferson County, ss:

I, Ralph H. Munro, being first duly sworn on my oath say that I am one of the defendants named in the foregoing answer, that I have read the statements therein contained, and that the same are true as I verily believe.

(Sgd.) RALPH H. MUNRO.

Subscribed and sworn to before me by the said Ralph H. Munro this 21st day of May, 1919.

[SEAL.]

EMILY R. LEGGETT,
Notary Public.

71 And thereafter to-wit: On the 14th day of June, A. D. 1919, there was filed in said cause an Order setting cause for hearing which said order is in words and figures as follows to-wit:

72 In the District Court of the United States for the Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Plaintiff,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MUNRO, Mayor; J. W. PRICE, J. F. Deardurff, Lon Israel, W. H. Conner, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney; R. H. Monroe, W. H. Conner, W. R. Baker, Defendants.

Order.

And now on June 14, 1919, it is

Ordered that June 25th, 1919, at ten o'clock A. M. at Iowa City, Iowa, be, and the same is hereby fixed as the time for making final record entries in the above cases under finding heretofore made. Also to determine whether injunctions shall stand pending appeal, and any other questions involved.

Copies of this Order will be sent by the Clerk to counsel for all parties.

Witness my hand.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed June 14, 1919. Wm. C. McArthur, Clerk.

73 And thereafter to-wit. On the 25th day of June A. D. 1919 there was filed in said cause Memerandum which is in words and figures as follows to-wit:

74 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Plaintiff,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Memorandum and Decree.

This, and other cases have been under consideration for some time, with a view, upon suggestion of the Court, that the question as to the sufficiency of the defense pleaded that even if the rates are confiscatory, the plaintiff is entitled to no relief because such rates were fixed by contract between the parties, could be determined without

the delay and expense involved in taking testimony upon the question as to whether the rates were in fact confiscatory.

The Court has heretofore, in Memorandum Opinion, expressed the view that where the rate for a public utility is fixed by contract between the City and the Utility Company, the same is binding, regardless of whether it is confiscatory, or whether it pays a fair profit upon the investment or not. The conclusion there expressed, is still adhered to—the Court being satisfied that such a contract is binding, and that the rate having been fixed by agreement of the Utility Company, such Company should be held to have waived any constitutional guarantee against deprivation of its property without compensation or due process of law.

75 The parties to these cases are now before the Court under order heretofore made, and upon answers in each of the cases, in which, in a separate count, a contract rate is pleaded as a defense, and no issue is made *is* such separate count of the answer, upon the allegation of the plaintiff's petition that the rates are confiscatory.

Counsel for plaintiff and for defendants have already expressed their views that the Court is without power to set the case for hearing upon this issue, and counsel for plaintiff made a specific request that the case be set for hearing upon all the issues presented by the answer. I can conceive of no reason why the Court, satisfied that the facts pleaded in the first Count of the answer, constitute a good defense, and that under such facts the complainant is not entitled to recover, should take the time, or permit the delay and expense incident to a full hearing of the case.

Present Equity Rules contemplate that cases shall be heard as speedily as possible, and Rule 29, in my judgment, permits the Court to set for hearing, this separate issue which goes to the entire cause of action alleged in the plaintiff's petition.

Doubt has been expressed, as to whether, in case the Court should hold the defense to be sufficient and this holding should be reversed upon appeal, the parties would be entitled to a trial upon the other issues presented by the answer. It is my understanding that in case the court should hold the defense sufficient, and the same should be reversed, that the Court of Appeals will remand it to this Court for further proceedings, which will leave the case open to be fully heard upon any issue then presented.

In view of these considerations, the court enters the following Decree:

(Endorsed:) Filed June 25, 1919. Wm. C. McArthur, Clerk. By Gertrude Darrell, Deputy.

76 And thereafter to wit: On the same day, June 25th, 1919, there was filed in said cause a Decree which is in words and figures as follows to wit:

77 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Plaintiff,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Decree.

And now on this 25th day of June, 1919, in the above entitled case, the parties appearing by counsel, and the pleadings herein being presented and duly considered, it is ordered and adjudged, that this case be set down for hearing upon Count One of the Answer—the issue presented by said Count of said Answer to be first tried and determined before proceeding with any of the other defenses herein.

To this order setting the case for trial upon said separate issue, the plaintiff and defendants except. The plaintiff requests the court to try the entire case—to appoint a Master and proceed to the determination of all the issues in the case. The request is denied, and the plaintiff excepts.

And now on this 25th day of June, 1919, this case coming on for hearing upon the issue raised by the First Count of the answer, under the foregoing order, the Court proceeds to the trial thereof, and the evidence being introduced upon such issue, and the court being now fully advised, finds:

That the rates complained of by the plaintiff, were in fact fixed by contract of the parties, as alleged in said Count of said
78 answer, and that said rates are valid and binding upon the plaintiff, regardless of the claim in the plaintiff's petition that the same are confiscatory, and that in view of such contract rates, the facts stated in the Bill of Complaint and amendments thereto, entitle the plaintiff to no relief; such rates being fixed by contract binding upon the plaintiff, and that for this reason the plaintiff is not entitled to any relief herein, and its Bill of Complaint is dismissed. The plaintiff excepts.

The plaintiff makes oral request that the temporary injunction heretofore granted, be continued, or that additional order of injunction be issued to be effective pending the appeal in this case, and is given leave to file written application in support of such request, and the temporary injunction and bond are continued until further orders herein. The Court reserving jurisdiction and power to make such further orders, and reserving full power upon final hearing, to make such orders as may be necessary to carry out any order of distribution of funds if the same becomes necessary under ruling of the Appellate Court.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed June 25th, 1919. Wm. C. McArthur, Clerk, By Gertrude Darrell, Deputy.

79 And thereafter to wit: On the 15th day of August 19*th* there was filed in said cause an Application to Continue Restraining Order which is in words and figures as follows, to wit:

80 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012. Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Application to Court to Continue Restraining Order.

To the Hon. Martin J. Wade, District Judge:

The above named complainant having now filed *his* petition for appeal from the decree of this Honorable Court rendered and entered in the above entitled cause upon the 25th day of June, 1919, does hereby make its request that the injunction now pending against the defendants restraining them from taking action, civil or criminal or interfering with the collection by plaintiff of certain rates for gas sold by *him* within the City of Fairfield, Iowa, under certain terms and conditions named in the order allowing the said writ of injunction be continued in full force and effect pending the determination of the appeal herein.

In support of this application the plaintiff again presents to the court that all of the reasons advanced in support of its application for a temporary injunction herein and considered by the court as warranting the issuance of said temporary injunction apply

81 with full force and effect to this application.

Complainant further suggests to the court that all funds collected by complainant in excess of the ordinance rates since the granting of the temporary writ have been deposited in a bank in the city of Fairfield named by this court as a fund in court subject to such action as might be deemed proper by *y*his court at the final determination of this litigation. This arrangement having proven satisfactory to the parties to this litigation your honor is requested to continue it in full force and effect providing the restraining order is granted pending the appeal herein.

(Sgd.) WM. SMYTH,
(Sgd.) WM. CHAMBERLAIN,
(Sgd.) JOHN A. REED,
Solicitors for Complainant.

82 STATE OF IOWA,
——— *County, ss:*

I, John A. Reed, being first duly sworn do upon my oath depose and say that I am the Vice President of the Iowa Electric Company; that I have read the foregoing application for an increase in rates and that the allegations therein contained are true as I verily believe.

(Sgd.) JOHN A. REED.

Subscribed and sworn to before me by the said John A. Reed, this 12th day of July, 1919.

(Sgd.) WILLIAM SMYTH.
Notary Public, Linn County, Iowa.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

83 And thereafter to-wit: On the 15th day of August there was filed in said cause a Petition for Appeal which is in words and figures as follows to-wit:

84 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012. Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Petition for Appeal.

To the Hon. Martin J. Wade, District Judge:

The above named Iowa Electric Company feeling aggrieved by the decree rendered and entered in the above entitled cause upon the 25th day of June, A. D., 1919, does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States sitting at the Capital City of Washington, D. C. under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of *him* be made.

IOWA ELECTRIC COMPANY,
By JOHN A. REED,
WM. CHAMBERLAIN,
WM. SMYTH,
Attorneys for Complainant.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

85 And thereafter to-wit: On the same day August 15th 1919 there was filed in said cause an Assignment of Errors which is in words and figures as follows to-wit:

86 In the United States District Court, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Assignment of Errors.

Now at the time of filing his petition for appeal in the above entitled action the complainant files the following assignment of errors and says that the decree entered in the above cause on the 25th day of June, 1919, is erroneous and unjust to the complainant:

First. Because the court declined and refused to hear the evidence in the case upon both counts of the bill of complaint and assigned the case for trial upon one count thereof, thus rendering it impossible for complainant to present its evidence as to the merits of the entire controversy and have the same incorporated as a part of the record in this case and upon this appeal.

Second. Because the court erred in holding that the maximum rate as set forth in the ordinance granting complainant's franchise was and is a rate established by contract between the complainant and the defendant city for the reason that the said rate provisions contained in said ordinance were and are legislative acts of the city of Fairfield passed and adopted pursuant to the authority granted to said city under the statutes of the State of Iowa and particularly under Section 725 of the Code of 1897 as amended.

87 Third. Because the court erred in holding that the complainant company was bound as by contract to render service within the defendant city at the maximum rate fixed in said ordinance granting complainant its franchise for the reason that the defendant city of Fairfield had no authority whatever under the

Statutes of Iowa to regulate complainant's rates of charge by contract but on the contrary had full and complete power and still has full and complete power to regulate said rates by legislative action and the provisions of said ordinance fixing the rates of charge of the complainant company are and should be held to be legislative enactments governing rates passed and adopted pursuant to the power of the defendant city to so regulate rates.

Fourth. Because the court erred in declining and refusing to hold that the provisions contained in the ordinance granting complainant its franchise were legislative provisions enacted pursuant to the statutes of the State of Iowa and as such subject to attack under the Constitution of the United States, provided the rates therein named were confiscatory in character.

Fifth. The Court erred in the final decree in refusing to allow the complainant to proceed to trial and introduce evidence upon the whole case or to appoint a Master to proceed to hear and try the whole case upon all of the issues made by the entire pleadings, thereby depriving complainant of its legal right to a trial on the question of the reasonableness of the ordinance rates and the unconstitutionality of said ordinance by reason of the unreasonableness of the rates therein named and deprived complainant of a judicial determination as to the reasonableness of said rates.

Sixth. The Court erred in its final decree in holding that
88 the Ordinance in controversy and the acceptance thereof by complainant constituted a contract as to rates for three years, notwithstanding that said ordinance by its terms undertook to fix rates for the term of three years, contrary to and in violation of the Statutes of the State of Iowa and particularly of Section 725 of the Code of 1897 and amendments thereof.

Seventh. The Court erred in its final decree in holding that the maximum rates fixed for a period of three years in the ordinance which contained complainant's franchise were binding for the full period of three years even if during said period of three years said rates became confiscatory for the reason that the only power which cities possess is that conferred by Section 725 of the Code of Iowa and amendments thereof, which is a continuing power which can only be exercised by and through legislative enactment of the council, not by agreement.

(Sgd.) WM. CHAMBERLAIN,
(Sgd.) JOHN A. REED,
(Sgd.) WM. SMYTH,
Solicitors for Complainant.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

89 And thereafter to-wit: On the 15th day of August A. D. 1919 there was filed in said cause an Order continuing the restraining order which is in words and figures as follows to-wit:

90 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Order.

And now on this 15th day of August, 1919, the application by the plaintiff for an order of supersedeas, continuing injunction pending appeal, having been filed, presented and submitted; and the court being now fully advised finds that such application should be, and the same is now granted, and the order restraining the defendants heretofore entered and still in force herein shall be and the same is hereby continued in full force pending appeal, and until case is finally disposed of, upon the following conditions:

(1) That the order, and all the conditions of the order heretofore made providing that all funds collected in excess of the ordinance rate be deposited in the bank, shall be and remain in full force until the case is finally disposed of.

(2) That such funds shall be deposited as in such prior order required.

(3) This court and the court to which appeal is taken shall have full power to revoke, change or modify this order at any time upon proper showing made.

(4) The plaintiff shall prosecute appeal with diligence, and this court or the court to which appeal is taken may revoke this
91 order in case of unwarranted delay.

To this order defendants except.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed August 15, 1919. Wm. C. McArthur, Clerk.

92 And thereafter to-wit: On the 18th day of August, A. D. 1919, there was filed in said cause an Order allowing Appeal which is in words and figures as follows to-wit:

93 In the District Court of the United States, Southern District of Iowa, Ottumwa Division.

No. 4012, Equity.

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Order Allowing Appeal.

It is hereby ordered that the appeal of the plaintiff be, and the same is hereby granted upon filing an appeal bond to be approved by the clerk of this court in the sum of Five Hundred ($500.00) Dollars.

(Sgd.) MARTIN J. WADE,
Judge.

(Endorsed:) Filed August 18, 1919. Wm. C. McArthur, Clerk.

94 And thereafter to-wit: On the 29th day of September, A. D. 1919, there was filed in said cause a Bond on Appeal which is in words and figures as follows to-wit:

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA; R. H. MONROE, Mayor; J. W. PRICE, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen, and X. C. Nady, as City Attorney, Defendants.

Bond on Appeal.

Approved and Filed September 29, 1919. Wm. C. McArthur, Clerk.

Know All Men by These Presents, That we, The Iowa Electric Company, a corporation, as principal, and John A. Reed and William G. Dows, as sureties, are held and firmly bound unto City of Fairfield, Iowa, R. H. Monroe, Mayor; J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen; and X. C. Nady, as City Attorney; in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said above named defendants City of Fairfield, Iowa, R. H. Monroe, Mayor, J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen; and X. C. Nady, as City Attorney; certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

95 Sealed with our seals and dated this 23rd day of September, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a term of the District Court of the United States for the Southern District of Iowa in a suit depending in said Court between Iowa Electric Company, Complainant, and City of Fairfield, Iowa; R. H. Monroe, Mayor, J. W. Price, J. F. Deardruff, Lon Israel, W. H. Connor, W. R. Baker, F. H. Simpson, as Councilmen; and X. C. Nady, as City Attorney, defendants, a decree was rendered against the said Iowa Electric Company, and the said Iowa Electric Company, Complainant having obtained an appeal to the Supreme Court of the United States to reverse the judgment in the aforesaid suit.

Now, the Condition of the Above Obligation is Such, That if the said Iowa Electric Company, Complainant shall prosecute its appeal to effect, and will answer all damages and costs, if it fail to make its plea good, then above obligation to be void; else to remain in full force and virtue.

IOWA ELECTRIC COMPANY. [SEAL.]
By JOHN A. REED,
Vice President.
JOHN A. REED. [SEAL.]
WILLIAM G. DOWS. [SEAL.]

Sealed and delivered in presence of:
J. B. HILL.
CARL B. MYERS.
WM. SMYTH.

Approved by:
MARTIN J. WADE,
Judge.

96 & 97 And thereafter to-wit: On the 16th day of October, A. D. 1919, there was filed in said cause a Praecipe for Transcript which is in words and figures as follows to-wit:

IOWA ELECTRIC COMPANY, Complainant,

vs.

CITY OF FAIRFIELD, IOWA, et al., Defendants.

Praecipe for Transcript of the Record on Appeal.

Hon. Wm. C. McArthur,
Clerk of the United States District Court,
Southern District of Iowa.

Appellant requests that you incorporate into the transcript of the record upon this appeal:

First. The bill of complaint and all amendments thereto.

Second. Process or subpoena with the return of the Marshal endorsed thereon.

Third. The answer of the defendants and all amendments thereto or substitutions therefor.

Fourth. All proceedings and orders in the case.

Fifth. The opinion and decree of the court.

Sixth. The petition for appeal and order thereupon.

Seventh. The assignment of errors.

Eighth. Bond on appeal.

Ninth. The citation on appeal.

98 Tenth. Clerk's certificate.

WM. CHAMBERLAIN,
JOHN A. REED,
Solicitors for Appellant.

Service of the above Praecipe for Transcript of the Record on appeal accepted this 15th day of October, 1919.

X. C. NADY AND
RALPH H. MUNRO,
Solicitors for Appellee.

(Endorsed:) Filed Oct. 16, 1919. Wm. C. McArthur, Clerk. By Louis J. Adelman, Deputy.

99 UNITED STATES OF AMERICA,
Southern District of Iowa, ss

I, Wm. C. McArthur, Clerk of the District Court of the United States for the Southern District of Iowa, hereby certify the foregoing 98 pages to contain a full, true and complete transcript of the record of the case of Iowa Electric Company vs. City of Fairfield Iowa, et al., No. 4012-Equity Ottumwa Division, as called for by the praecipe for transcript filed in said cause October 16th, 1919; as full true and complete as the originals thereof on file and of record in office in the City of Ottumwa in said district.

I further certify that I transmit herewith as part of said record the original Citation with return of service thereof on Defendants.

In witness whereof I hereunto set my hand and affix the seal of said Court at office in the City of Ottumwa in said District this 17th day of October A. D. 1919.

[Seal U. S. District Court, Southern District of Iowa.]

WM. C. McARTHUR,
Clerk of said Court.

Endorsed on cover: File No. 27,332. S. Iowa D. C. U. S. Term No. 577. Iowa Electric Company, appellant, vs. City of Fairfield, Iowa, et al. Filed October 20th, 1919. File No. 27,332.